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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

EDWARD A. RUMELY, APPELLANT,
v.
THOMAS D. McCARTHY, UNITED STATES Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. | No. 874.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES.

THE ORIGIN OF THE QUESTION.

Edward A. Rumely was indicted in the Supreme Court of the District of Columbia for an alleged violation of the Act of October 6, 1917, the Trading with the Enemy Act, so called. This indictment is called in the record the "Washington indictment." His removal to the District of Columbia was the subject of proceedings begun before a United States Commissioner in the Southern District of New York. After hearing, the Commissioner issued his warrant of commitment. Rumely then sued out, in the District

Court, a writ of *habeas corpus* and, in aid thereof, one of *certiorari*. By virtue of the latter the entire record before the Commissioner, including the testimony taken, was brought up. After further hearing, the District Judge dismissed the writs and, upon application by the District Attorney, ordered a warrant for removal to issue. Rumely now appeals to this court.

The opinion of the District Court appears in the record (pp. 202–206).

As bearing upon certain contentions made by appellant it may be added that the District Court formally entered its consent to the removal despite the pendency of certain indictments in that district against appellant. These indictments are referred to in the record as the New York indictments. It also directed the Government to inform Rumely, within 30 days after he should have pleaded to the Washington indictment, as to which indictment it was intended by it first to move for trial.

THE STATEMENT OF THE CASE.

The indictment in the District of Columbia is set out in the record. (R., 8–10.) It is in two counts. Each count recites the existence at the time of the offense charged of a state of war between the United States and the Imperial German Government. Each sets out that at the time in question the act of October 6, 1917, was in effect. In each it is alleged that the Alien Property Custodian, an officer of the United States appointed under the authority of that statute, had, at the time of the offense, his office for the

transaction of official business at the District of Columbia and at no other place.

The counts differ as to the particular violation of the statute charged. In the first count reference is made to the fact that the statute made it the duty of every person in the United States who held or controlled any property of or for an enemy of this country to report that fact to the Alien Property Custodian within a certain period which is alleged to have expired upon December 20, 1917; it is then charged that on October 6, 1917, Rumely had custody and control of certain stock of the S. S. McClure Newspaper Corporation, a corporation of the State of New York, which, as Rumely well knew, belonged to the Imperial German Government; and that Rumely wilfully "at the District of Columbia and within the jurisdiction of this court" failed, neglected, and omitted to report that fact within the time allowed for that purpose and had continued so to neglect and omit until the date of the indictment.

In the second count reference is made to the requirement of the statute that anyone who was "in any way indebted" to an enemy should make a similar report of the fact to the Alien Property Custodian and it is charged that Rumely well knew himself to be indebted to the Imperial German Government in the amount of $1,451,700, but nevertheless wilfully neglected, omitted, and failed to report that fact to the Custodian either during the time allowed for that purpose or since.

For the information of the Court, the appropriate provisions of the statute, which are summarized in the indictment, are set out in the margin.[1]

Before the Commissioner, Rumely admitted his identity and offered no evidence to meet the *prima facie* case made by producing an exemplified copy of the indictment, with respect to the facts that:

(1) On October 6, 1917, Rumely, as he well knew, held the stock of the New York corporation for the German Government and did not, within the time allowed by law, report the fact to the Custodian.

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[1] Section 7 (*a*), par. third:

"Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen: *Provided*, That the name of any person shall be stricken from the said report by the Alien Property Custodian, either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy. The President may extend the time for filing the lists or reports required by this section for an additional period not exceeding ninety days."

Section 16:

"That whoever shall willfully violate any of the provisions of this act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both: * * *"

(2) On October 6, 1917, Rumely, as he well knew, was indebted to the German Government in the sum of $1,451,700 and did not, within the time allowed by law, report the fact to the Custodian.

Evidence (which is printed in the record, pp. 21–202) was introduced in support of various contentions of the appellant. He sought, for example, to challenge the averment of the indictment that the official office of the Custodian at the time in question was in the District of Columbia only. It is unnecessary to review this evidence in detail. The Commissioner and the District Court (R. 205) found that "up to December 20, 1917, when Rumely's offense was complete, the office of the Alien Property Custodian was at Washington, D. C.," and not elsewhere.

In support of a constitutional objection which will be later stated, appellant offered evidence that, beginning on November 12, 1917, he indorsed and arranged for the discount of certain notes and did certain other business acts for the benefit of the New York corporation whose stock, it is charged, he was holding for the German Government.

Finally there was brought before the Commissioner and the Court the fact that the indictments against Rumely, known as the New York indictments, were pending in the Southern District of New York. These indictments appear in the record (pp. 169–180). Generally speaking, they grow out of the same transactions as the Washington indictment. In the first of them, however, the charge is that Rumely and another conspired to omit to report certain facts

to the Custodian. In the second, Rumely is charged with perjury in making a certain report to the Custodian which was known by him to be false.

THE CONTENTIONS OF THE PARTIES.

Upon the foregoing case, appellant contends that the action of the District Court in dismissing appellant's writ of habeas corpus was in error because, as he says:

1. The provisions of the Trading with the Enemy Act upon which the indictment is predicated can not constitutionally be applied to a person in the situation of the appellant.

2. The Commissioner did not have probable cause to believe that appellant had committed any offense cognizable by the courts of the District of Columbia.

3. Under the circumstances of the case removal to the District of Columbia will impose unnecessary and improper hardship and expense upon appellant and will involve a denial of his constitutional right to a speedy trial upon the New York indictments.

4. That the District Court was in error in not requiring the Government to state its reasons why it desired removal.

In reply the United States points to appellant's admission of his identity, to his failure to controvert the allegation of his failure to comply with the positive requirement of the statute, and to the specific finding against him upon the issue raised by him as to the location of the office of the Custodian. These circumstances, it says, show probable cause suffi-

cient to warrant the action of the Commissioner and the Court. Of the remaining contentions made by appellant, it says that they represent only another attempt to substitute a hearing upon *habeas corpus* for a writ of error and to supersede by the *habeas corpus* tribunal the functions of the trial Court. In view of the repeated declarations of this Court that in the absence of rare and special circumstances not present here it will not examine upon such a proceeding matters which properly should be dealt with in the orderly processes of trial and appeal, it says that this case is devoid of merit, if not indeed frivolous.

ARGUMENT.

I.

A PRIMA FACIE CASE WAS MADE BEFORE THE COMMISSIONER.

The duty of a United States Commissioner in removal proceedings was defined in *Haas* v. *Henkel*, 216 U. S. 462. If the United States Court for the district to which removal is sought has jurisdiction over the accusation made in that district and the case is there triable, the Commissioner has no discretion, if there has been a showing of probable cause. His duty is to detain the accused and that of the District Judge is to issue his warrant for the removal of the accused to the district where the trial is to be had.

In this case an indictment returned in the District of Columbia was presented to the authorities in the Southern District of New York. It charged appel-

lant with having wilfully neglected and omitted to report to the Alien Property Custodian the facts as to the enemy ownership of certain property held by appellant and as to the existence of an indebtedness owing from appellant to an enemy. Such a neglect and omission is made an offense by sections 7 (a) and 16 of the Trading with the Enemy Act. The presentation to the Commissioner of the indictment made a *prima facie* case against the accused. *Hyde* v. *Shine,* 199 U. S. 62, 84, *Haas* v. *Henkel, supra.* No evidence was offered to controvert it.

The only issue of fact tendered by the accused with respect to any matter appearing upon the face of the indictment was made by his challenge of the averment that the office of the Custodian for the transaction of official business was in the District of Columbia. Upon this issue the Commissioner made a finding of fact adverse to the appellant. That conclusion is not reviewable upon *habeas corpus. Hyde* v. *Shine, supra,* 84. But were it reviewable, the District Judge found in terms that the finding of the Commissioner that the office of the Custodian was, at the time in question, in the District of Columbia and nowhere else, was right. (R. 202.)

Under these circumstances the utmost that remained open to consideration by the Commissioner was whether the offense charged was indictable and triable in the District of Columbia.

Looking again at the facts established by the present record, the thing with which appellant is charged is his failure to perform his statutory duty of

reporting certain facts to the Alien Property Custodian. Certainly one place where he failed to perform this duty, which in fact was wholly omitted, was in the District of Columbia, where the Custodian officially was at the time when the duty was left unperformed. In view of *Haas* v. *Henkel*, supra, *Hyde* v. *Shine*, supra, In re *Palliser*, 136 U. S. 257, and other cases familiar to this Court this of itself is enough. But it is affirmatively established that the Custodian had no office other than that in the District of Columbia. It was there that he had his official being. It was there and there only that the offense was committed. This is clear as a matter of reason and has the support of authority. *United States* v. *Lombardo*, 241 U. S. 73; *New York, etc., R. R.* v. *United States*, 166 Fed. 267. In each of these cases there was a failure by a person resident elsewhere than in Washington to file with an officer of the United States whose office was located in Washington a statement required by statute to be filed with that officer. In each case demurrers to indictments found in districts other than the District of Columbia were sustained upon the ground that the offense was committed in the District of Columbia and there alone.

It follows therefore that there existed all the elements which make it the duty of the Commissioner to detain and of the District Judge to order the removal of the accused.

It remains only to inquire whether any of the objections raised by appellant with respect to mat-

ters which do not appear upon the face of the indictment are open to him upon *habeas corpus* proceedings and, if so, whether any of them require his discharge. In the view of the United States neither of these things is true.

II.

THE GROUNDS OF ALLEGED ERROR RELIED UPON BY APPELLANT ARE NOT OPEN TO HIM IN THIS PROCEEDING.

While the exact limits of the field of inquiry open upon *habeas corpus* proceedings have been said by this Court not to have been defined by a hard and fast rule (*Henry* v. *Henkel*, 235 U. S. 219), it is perfectly clear that those limits are exceedingly narrow except in certain classes of cases described as rare and exceptional. *Jones* v. *Perkins*, 245 U. S. 390. Apart from these exceptional cases whose nature is indicated in *Henry* v. *Henkel*, 235 U. S. 219, 228, and the authorities there cited and of which this case is not one, this Court has repeatedly said that it will not permit a hearing upon *habeas corpus* to be used as a substitute for the functions of the trial court nor as a writ of error. "The general rule is that on such applications the hearing should be confined to the single question of jurisdiction and even that will not be decided in every case in which it is raised." *Henry* v. *Henkel*, ubi supra.

In that case, this Court did refuse to pass upon the jurisdictional question sought to be raised. There was an earnest contention that the statute upon

which the indictment there was based was unconstitutional if so construed as to be applicable to the facts alleged. In a somewhat weaker form such a contention is made in this case. But the Court said (230), after speaking of the presumption in favor of the constitutionality of the enactments of the Congress, that it would not be proper for a committing magistrate to treat as invalid a statutory declaration of what should constitute an offense "except in those rare and extreme circumstances in which the act was plainly and palpably void." It added that the same rule controlled the District Court upon an application like this for discharge upon a writ of *habeas corpus* and was equally applicable to this Court upon appeal.

It is unnecessary at so late a day again to collate the decisions in which this rule, which rests upon manifest considerations important to the orderly conduct of the business of the Courts, has been developed and announced. It is rather interesting, however, to notice that almost every alleged ground of error now relied upon has at one time or another been said by this Court to be no warrant for release upon *habeas corpus*.

Mention of the constitutional point, which appears to be that principally urged, has already been made. The contention that the granting of removal to the District of Columbia will infringe appellant's right to a speedy trial of the New York indictment is like one of those urged upon this Court in *Haas* v.

Henkel, 216 U. S. 462. (See page 475 and cases there cited.) In that case also there was some question made respecting the consent of the New York court to the removal despite the pendency of indictments before it. That question is here raised. Here, as in the *Haas* case, consent has been granted in terms (R. 207). In *Peckham* v. *Henkel*, 216 U. S. 483, it had not but removal was sustained. The complaint that removal involves hardship to the appellant has been repeatedly made. *Haas* v. *Henkel*, ubi supra; *Hyde* v. *Shine*, 199 U. S. 62, 78; *Henry* v. *Henkel*, 235 U. S. 219, 229.

In this connection it is fair to remark that there is here no question of removal across the continent as in *Hyde* v. *Shine* in which removal was none the less sustained.

Finally the pendency of other indictments in the place of appellant's residence presents nothing new. Whereas here the indictment in the District of Columbia charges a manifestly different offense from that charged in the New York indictments, it is noteworthy that in *Haas* v. *Henkel*, the indictment in the domicil of accused was for the identical offense charged in that upon which removal was, with success, demanded.

It follows from what has been said that the alleged grounds of error relied upon by appellant relate to matters which must be raised if at all in the trial court and are not open on this appeal.

III.

THE CONSTITUTIONAL POINTS RAISED BY APPELLANT ARE NEITHER OPEN NOR VALID.

It is true that in *Henry* v. *Henkel* this Court implied that it might give weight, even upon *habeas corpus* proceedings, to a constitutional objection if it appeared that the case was one of "those rare and extreme cases in which the act was plainly and palpably void." In that case, however, the Court refused to consider upon *habeas corpus* the constitutional question raised and referred with emphasis to *Ex parte Royall*, 117 U. S. 241, not only because of the applicability of its reasoning but because of the fact that in that case the statute upon which the charge was based was eventually held to be void.

It is deemed proper therefore to discuss the contention of appellant only so far as to show that the statute is far from being plainly and palpably void. It is unnecessary to say that, at what it believes to be the proper time, the United States is prepared to undertake to demonstrate fully that no substantial doubt as to the validity of the statute exists.

Appellant does not contend that the statute is generally void but only that by reason of special circumstances it is void as to him as involving a violation of the fifth amendment. The argument upon which this, apparently the principal contention of the appellant, is based is somewhat intricate and not without ingenuity.

It begins by remarking that the allegation of the Washington indictment as to the German ownership

of stock held by appellant in the New York corporation is by reason of appellant's failure to controvert it "*for the purposes of this proceeding*, to be taken as true," [His italics.] Then he says that he himself offered evidence which the government did not contradict, that beginning on November 7, 1917, he did acts which are "trading" on behalf of the New York corporation within the meaning of that word as used in section 3 of the Trading with the Enemy Act. This he says was trading on behalf of an enemy because of the enemy interest in the stock of the corporation. Since trading on behalf of an enemy is made unlawful by section 3 of the statute, and therefore an offense by section 16, he says that he has proved that he is guilty of that offense, if in fact the stock was owned, as alleged, by the German Government. From all this he concludes that he could not constitutionally be required to make the report demanded by section 7 (a), since it would tend to disclose his commission of the crime which, assuming his premises, he now confesses.

Since the allegation of the Washington indictment is the foundation upon which this superstructure is erected it is important to notice that that allegation is simply that appellant had custody of "certain stock" of the New York corporation. (R. 9.) The number of shares or the proportion which these holdings bore to the total capital stock of the New York corporation was not alleged, because, of course, it was not material whether it was much or little.

Appellant's contention is, therefore, that every person who after November 5, 1917, did any act whatever for any corporation in which any stock ownership however small was in enemy hands was guilty of trading with the enemy unless a license so to act was first obtained.

The short answer to this contention, which is a vital link in appellant's argument, is that Congress in section 2 defined "enemy" for the purposes of the statute, and in so doing said that it should include—

> any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country *other than the United States* and doing business within such territory. [My italics.]

Congress thus made it clear that an American corporation was not an enemy whatever might be the ownership of its stock, and it was careful to provide (sections 7a and 7c) for the sequestration and control by the Alien Property Custodian of whatever stock of such a corporation should be found to be enemy owned. The groundwork of appellant's contention therefore falls.

Apart from this, however, it by no means follows that, because for purposes of civil administration a person is required under penalty to make reports which under some conditions might lead to the discovery that the person reporting had committed a crime, the statute is unconstitutional. Automobile drivers must display license numbers (*St. Louis* v.

Williams, 235 No. 503); they must give their names and residences to those whom they injure or to police officers (*Ex parte Kneedler*, 243 Mo. 632; *People* v. *Rosenheimer*, 209 N. Y. 115); pawnbrokers must keep books and exhibit them (*St. Joseph* v. *Levin*, 128 Mo. 588); butchers must report the brands of cattle which they slaughter (*Ashton* v. *State*, 11 S. W. 1889); bankrupts must surrender their books of account (*Matter of Harris*, 221 U. S. 274); and persons holding receipts from the Federal Internal Revenue Bureau must make the fact public, although it may be that under the law of the State the selling of liquor is absolutely prohibited under heavy penalties (*State* v. *Hanson* 16 N. D. 347).

Examples might be multiplied but it is deemed unnecessary. Certainly the statute is not palpably void.

It may be added that appellant's argument has no application to the second count of the Washington indictment. That circumstance in itself renders it irrelevant to the present question. *Price* v. *Henkel*, 216 U. S. 488, 490.

Appellant's second constitutional point that he is being deprived of a speedy trial upon the New York indictment need not long detain the Court. If in fact it turns out that he is improperly delayed his remedy is by addressing the Court in New York in a suitable but independent proceeding. The authorities already cited demonstrate that this is not a valid objection to removal and arraignment.

IV.

THERE IS NOTHING IN APPELLANT'S POINT WITH RESPECT TO THE SUPPOSED DUTY OF THE DISTRICT COURT TO REQUIRE THE GOVERNMENT TO STATE THE REASONS FOR ITS REQUEST THAT THAT COURT CONSENT TO THE REMOVAL.

The District Court, as pointed out, did in terms consent. Apparently the appellant thinks that it was improvident in so acting. The matter is purely one of comity and has but a limited application in criminal cases. *Peckham* v. *Henkel*, 216 U. S. 483, 486, and cases cited. Since the District Judge was apparently satisfied, it is a little difficult to understand what right the appellant claims or upon what it is supposed to be based.

As already pointed out the indictment in the District of Columbia is for an offense different in character and provable by different testimony from that in New York. The District Judge has directed the government to inform appellant, after he shall have pleaded to the Washington indictment which case it proposes first to move for trial. If, however, reasons are necessary, it may be suggested that since appellant insists that the underlying facts of the two indictments are the same and emphasizes the fact that he has obtained from the New York court a commission for the taking of testimony abroad, it is obviously in the interests of justice both to the government and to the appellant that if a similar application is to be made in the case pending in the District of Columbia it should be made and the commission, if one is to issue, issue and be executed

simultaneously with that obtained in New York. There are other and controlling reasons why it was deemed proper to procure indictment in the District of Columbia, to demand removal and to ask the consent of the Court in New York thereto but it is not deemed necessary or proper that they should be disclosed.

CONCLUSION.

The appeal, therefore, should be dismissed.

LaRue Brown,
Assistant Attorney General.

April, 1919.

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